

PURCHASING FROM TRUSTEES

Where an exit involves the sale by Trustees of a significant holding of shares, it is vital that early consideration is given to the particular issues relating to ownership of shares by Trustees. The Buyer will need to satisfy itself that the Trustee has the capacity to transact and that it will be able to enforce its rights against the Trust assets. The Trustees will be concerned to avoid personal liability and generally to safeguard the Trust assets for the benefit of the Beneficiaries. Key considerations may be summarised as follows:-

The Buyer will want to know that the Trustees are validly appointed, own or control the shares which are being sold and have the power to sell those shares. The Trustees may need to disclose all relevant Trust documents and the Buyer will generally require legal opinions, particularly where the Trust or Trustees are offshore.

The Buyer will also need to consider the extent to which the Trustees can or will give warranties and indemnities. Even if the Trustees have the requisite power under the Trust instrument or general law, as they are rarely themselves directors or involved in the day to day management of the business, they will generally not give warranties other than as to title and capacity to sell.

Thought must be given to whether there are alternative ways for the Trustees to preserve access to the sale proceeds forming part of the Trust assets to cover their proportionate share of any liability claims, without giving full commercial and tax warranties and whilst retaining the flexibility to invest and distribute Trust assets and to ring-fence those Trust assets which do not represent the proceeds of sale.

Rooks Rider has advised many Seller-Trustees on their options in this highly complex area and the solution in each case must be tailored to the structure of the particular transaction. In certain circumstances we have used indemnity or retention mechanisms combined with certain restrictions on the Trustees. Any solution must be carefully crafted so as not to give rise to any unlawful fetter on the Trustees' discretion.

For various tax and other reasons, any warranties given by Trustees should only be given on a several basis and any liability assumed in respect of the transaction must be proportionate to the Trustees' shareholding in the target. As the Trustees will be personally liable in the event of a successful claim, they will need to be able to indemnify themselves from the Trust assets and their liability must further be limited to the amount of Trust assets under their control at the time when any claim is settled.

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